Supreme Court, U.S.
FILED
05-407 SEP - 9 2005
OFFICE OF THE CLERK

No. 05-

In the
Supreme Court of the United States

LUIS A. ZHININ,

Petitioner,

vs.

ALBERTO R. GONZALES,
Attorney General of the United States

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In the light of the precedent-setting decision of the Court of Appeals for the Seventh Circuit, in the case of ***SUBHAN v. ASHCROFT, CA #03-3869*** **(7th Cir. September 7, 2004)**, aliens who were "grandfathered" by Section 245(i) of the Immigration and Nationality Act (INA), but who were not able to prove their eligibility through no fault of their own, due to the fact that their labor certifications have not yet been processed and approved by the Labor Department, should be allowed "continuances" by the Immigration Court as a matter of substantive and procedural due process.

Since this question is a matter of first impression before this Honorable Court, and the fact that the 7th Circuit decision conflicts with the decision rendered by the Third Circuit in the above-entitled case, there is a compelling reason, therefore, for this Honorable Court to grant the instant Petition for Writ of Certiorari.

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the case caption.

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OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit was entered on May 2, 2005, under the caption Luis A. Zhinin *v.* Ashcroft, No. 04-2708. The judgment is attached hereto as Appendix "A". Petitioner filed a timely Petition for Panel Rehearing. The Petition for Rehearing was denied on August 11, 2005, as evidenced by a copy of the Panel's decision, copy of which is hereto attached as Appendix "B".

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 2, 2005. The Third Circuit Court of Appeals had jurisdiction over this matter under INA §242(a)(b), 8 U.S.C. §1252 (a)(b), as there had been a final adjudication on the merits by the Board of Immigration Appeals on August 28, 2003. Petitioner's motion to reopen was also denied by the Board of Immigration Appeals on May 17, 2004. Copies of the BIA's decisions are hereto attached as Appendix "C".

The Petition for Writ of Certiorari has been filed within the 90-day reglementary period prescribed by law, reckoned from the date of the Third Circuit's decision on August 11, 2005, denying Petitioner's Petition for Rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

REASONS FOR GRANTING THE WRIT

Petitioner contends that the instant Petition should be granted as the Third Circuit's decision conflicts with the 7th Circuit.

The Third Circuit's decision contains significant legal errors. It is also inconsistent with its own case law on the same issue presented in the instant case. The case is of extreme importance, especially when considering that legal errors may result in deportation, as in the instant case. Accordingly, Petitioner respectfully requests that the Court grant his writ of certiorari.

Finally, consideration of this Hon. Court is necessary to secure and maintain uniformity of decisions between the Seventh Circuit's ruling in *Subhan v. Ashcroft*, (*supra*), and the Third Circuit's ruling, on the same issue involving abuse of discretion committed by the Immigration Judge, which arose from the latter's arbitrary denial of Petitioner's motion for continuance. This appeal also involves a question of law, in that, it raises the issue of whether abuse of discretion may be a ground for the reopening of a removal order, despite the lapse of the period of the numerical limitation for filing the same.

STATEMENT OF THE CASE AND FACTS

Shorn of its non-essentials, the following summary of facts may be stated thus –

Petitioner is a twenty-eight (28) year old, male, native and citizen of the Republic of Ecuador who entered the United States in May of 1993 without authorization or inspection by an immigration official.

On or about June 25, 1996, Petitioner applied for adjustment of status as a lawful permanent resident based on his marriage to his United States citizen spouse, Elizabeth Sosa. Subsequent to the filing of that application, but prior to the adjustment interview, Petitioner and his wife were separated. At the time of the scheduled interview on July 15, 1997, neither Petitioner nor his spouse appeared. Hence, Petitioner's adjustment application was denied on November 10, 1997.

After said denial, Petitioner was placed in removal proceedings, on the basis of a Notice to Appear dated May 10, 2001, charging him with violation of US immigration law, particularly, as an alien present in the United States without being admitted or paroled.

On October 11, 2001, during a Master Calendar Hearing before the Immigration Judge, Petitioner admitted the factual allegations in said Notice to Appear, but MOVED FOR CONTINUANCE, on the ground that

Petitioner had a Labor Certification Application pending, which was filed prior to April 30, 2001, the expiry date of Section 245 (i) of the Immigration and Nationality Act. (To date, the New Jersey Labor Department has not yet acknowledged receipt of said labor certification application, since it has not issued a Receipt Notice to Petitioner).

Petitioner also moved the Immigration Judge for the alternative relief of voluntary departure.

After hearing on the merits, the Immigration Judge denied Petitioner's aforesaid motion for continuance, but granted the relief of voluntary departure effective up to December 11, 2001. On appeal, the Board of Immigration Appeals (BIA) affirmed the judge's decision, stating that "respondent has not shown that the Immigration Judge's **denial of his motion for a continuance** either denied him a full and fair hearing or resulted in prejudicial harm," and that Petitioner "has not submitted any evidence of his eligibility for that relief of adjustment of status under section 245(i) of the INA".

Petitioner was supposed to leave the United States on September 27, 2003, pursuant to the BIA's affirmance order, but failed however to depart on that date, and continues to be present in the country, while awaiting adjudication by the Department of Labor of his pending Labor Certification Application. In his plea for continuance before the Immigration Judge, Petitioner argued that he filed a Labor Condition Application prior to April 30, 2001, the sunset date of INA §245(i). Nevertheless, as earlier stated, the Immigration Judge denied said request

allegedly since Petitioner failed to present evidence of said filing.

On March 23, 2004, Petitioner filed a Motion to Re-open with the BIA, asserting, among others, the fact that, **had his motion for continuance been granted,** Petitioner would have sufficient time to offer proof of the filing of his Labor Certification Application, which is the basis of his requested relief for adjustment of status.

Additionally, Petitioner contended that he was not given a genuine pportunity to present any documentation in support of his position that a Labor Certification had been filed, considering that the BIA did not take administrative notice of the fact that the New Jersey region delays in issuing a Receipt Notice for pending labor certification applications.

Moreover, Petitioner alleged that he was denied due process of law under Fourteenth Amendment, since the Immigration Judge had denied his motion for continuance at the preliminary stage of the hearing, *e.g.* during the master calendar hearing, and did not afford petitioner the right to present rebuttal evidence in court at the appropriate time for him to do so.

The BIA, however, in a decision rendered on May 17, 2004, denied Petitioner's motion to reopen, saying that the same was allegedly filed out of time. On appeal, the Third Circuit Court dismissed his Petition for Review, as well, as his Petition for Rehearing. Hence, this petition for certiorari.